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No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE

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BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE

This brief is filed with the written consent of counsel for both petitioner and respondent. Copies of the letters of consent have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference represents nearly all of the nation's Class I railroads in a wide variety of labor relations matters of concern to the railroad industry generally. A committee established within the Conference, the National Carriers' Conference Committee, normally represents these railroads in national collective bargaining with the unions that represent the railroads' employees. Since the 1950's this collective bargaining has included negotiations to establish and maintain a

program of benefits now known as the Railroad Employees National Health and Welfare Plan. Among other things, the railroads' plan provides hospital, basic medical-surgical, and major medical expense benefits to hundreds of thousands of railroad employees and their dependents. The plan provides more extensive benefits for expenses related to sicknesses and injuries suffered by an employee's spouse and other dependents than it does for their pregnancy-related expenses. In the event the decision of the Court of Appeals is affirmed, the cost to the railroads represented by the Conference of increasing dependents' pregnancy benefits may be substantial.

SUMMARY OF ARGUMENT

The issue presented in this Court is a narrow one: Does petitioner's health plan violate, as a matter of law, section 703(a)(1) or (2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), (2) (1976), because more extensive benefits are paid with respect to expenses for employees' spouses' sicknesses or injuries than for their pregnancies? The Equal Employment Opportunity Commission (the "EEOC") sought to establish in the courts below no more than that petitioner's plan violates Title VII because Questions and Answers Numbers 21 and 22 of the EEOC's Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604 app. (1982), correctly interpret the law.[1] Those Questions and

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[1] "21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of

Answers declare in effect that petitioner's plan is unlawful on its face. The EEOC did not seek to demonstrate that petitioner's plan was in any way designed to discriminate against male employees or that it had an impermissible discriminatory impact on them.

We show in this brief that the Pregnancy Discrimination Act ("PDA" or "Act"), Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (Supp. IV 1980), applies only to female employees and applicants for employment. It does require that employees' pregnancy benefits be no less extensive than benefits paid for employees' sicknesses or injuries, but it does not apply at all to spouses' benefits, as the express terms of the Act and its legisla-

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male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of other dependents as long as it excludes the pregnancy-related conditions of the dependents of male and female employees equally.

"22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level." 29 C.F.R. § 1604 app. at nos. 21, 22 (1982).

tive history demonstrate. Congress was concerned for the harms suffered by female employees when, among other things, pregnancy coverage is limited. These harms have no relevance to the wives of male employees.

The Title VII principles announced in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), remain unimpaired in the context of spouses' health benefits. Those principles require reinstatement of the judgments of the District Court, since respondent has not attempted to prove that petitioner's plan has a discriminatory impact on male employees or that it is merely a pretext for discrimination against them.

We also show that even if this Court were to reexamine *Gilbert* and *Satty* and conclude that distinctions based on spouses' pregnancies are not facially neutral as a matter of law, the distinction made in petitioner's plan does not result in any employment-related injury to male employees. Male employees do not receive lower compensation than female employees, because petitioner provides no less extensive spouses' benefits to male employees. The plan, in fact, includes a benefit, the pregnancy benefit, which female employees cannot use for their spouses. For this reason, if the plan is more valuable to either group, it is more valuable to male employees.

ARGUMENT

I. THE PREGNANCY DISCRIMINATION ACT DOES NOT PROHIBIT THE PAYMENT OF MORE EXTENSIVE BENEFITS FOR SPOUSES' SICKNESSES OR INJURIES THAN FOR THEIR PREGNANCIES

The decision below turns on the Court of Appeals' construction of the Pregnancy Discrimination Act to apply to medical benefits for male employees' wives as well as to medical benefits for female employees. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 667 F.2d 448, 451 (4th Cir.), approved and adopted, 682 F.2d 113 (4th Cir. 1982) (en banc) (per curiam). That construction is erroneous. The language and legislative history of the PDA show that the Act applies only to women who are themselves employees or applicants for employment. Every other court to construe the Act has so held. See *EEOC* v. *Lockheed Missiles & Space Co.*, 680 F.2d 1243 (9th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3485 (U.S. Dec. 15, 1982) (No. 82-1006); *EEOC* v. *Emerson Electric Co.*, 539 F. Supp. 153 (E.D. Mo. 1982), appeal docketed, No. 82-1647 (8th Cir. May 27, 1982); *EEOC* v. *Joslyn Manufacturing & Supply Co.*, 524 F. Supp. 1141 (N.D. Ill. 1981), appeal docketed, No. 82-1634 (7th Cir. Apr. 14, 1982).

Congress enacted the PDA in response to the decisions of this Court in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977). *Gilbert* and *Satty* held that pregnancy-based distinctions among employees in fringe benefit plans were not sex-based and so were not discriminatory *per se* under section 703(a) of Title VII. The PDA amended the definitional section of Title VII, section 701, to add new subsection (k):

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth,

> or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise."

The Court of Appeals below read this amendment effectively to equate distinctions based upon the pregnancy of an employee's wife with distinctions based upon the sex of the employee himself, thereby making those distinctions *per se* violations of section 703(a). Although the Court did not say so, it apparently considered that if an employee's wife's pregnancy is equated with her sex, her pregnancy is ineluctably equated to the employee's male sex, so that Title VII's general proscription of sex-based discrimination against employees applies.

The Court of Appeals for the Ninth Circuit, in *EEOC* v. *Lockheed Missiles & Space Co.*, held otherwise. It ruled that distinctions based on pregnancy have been declared by the PDA to violate Title VII only when the pregnancy is that of an employee or an applicant for employment. The Court then applied the principles and reasoning of *Gilbert* and *Satty* to conclude that a distinction based on the pregnancy of anyone other than a female employee or applicant for employment "is not a gender based distinction at all." 680 F.2d at 1246 (quoting *General Electric Co.* v. *Gilbert*, 429 U.S. at 136).

The language of the PDA better supports the Ninth Circuit's reading. The first clause of the Act expands the meaning of "sex" to include pregnancy, childbirth, and related medical conditions. If this new definition is interpolated into section 703, the result leads to only one reasonable construction of the scope of the Act:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . pregnancy, childbirth, or related medical conditions . . .; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . pregnancy, childbirth, or related medical conditions . . . ."

As the Ninth Circuit observed, "[t]his can hardly be read to apply to male employees," *EEOC* v. *Lockheed Missiles & Space Co.*, 680 F.2d at 1245, whether or not they have pregnant wives. The Fourth Circuit did not mention section 703.

The second clause of the PDA requires employers to treat equally for employment-related purposes "women affected by pregnancy" and "other persons . . . similar in their ability or inability to work." The Ninth Circuit held that this language referred to female employees and underscored Congress' intention to prohibit only distinctions based on employees' pregnancies. 680 F.2d at 1245. The Fourth Circuit, by contrast, held that because an employer serves "employment-related purposes" by providing dependents' benefits, the "women affected by pregnancy" for whom the second clause requires equal treatment include female spouses as well as female employees. The Court found support for this reading in the statutory comparison of pregnant women to "other persons," rather than "other employees," similar in their capacity for work. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 667 F.2d at 450-51.

The Fourth Circuit's analysis is faulty for three reasons. First, it ignores the fact that section 703 does not

protect spouses, pregnant or not. Second, the House and Senate Reports on the Act repeatedly paraphrase "other persons" as "other employees" and "other workers." See S. Rep. No. 331, 95th Cong., 1st Sess. 4, 7, 14 (1977); H.R. Rep. No. 948, 95th Cong., 2d Sess. 3, 4, 5, 13 (1978). Finally, a female spouse's capacity to work is irrelevant in this context. To suppose that Congress intended to prohibit the payment of pregnancy benefits that are less extensive than other medical benefits for wives able to work but to permit such a differentiation for wives unable to work is hardly reasonable. The only persons whose capacity to work is known or relevant to an employer providing health benefits are its employees.[2]

If the language of the PDA could be thought ambiguous, its legislative history dispels any doubt. Even a relatively brief examination shows that the Ninth Circuit has read the PDA correctly.

The suggestion that the PDA should change existing law with respect to pregnancy-related benefits for employees' spouses was explicitly rejected in the Senate Committee Report:

> "Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees; it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore

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[2] Judge Hall, dissenting from the decision below, also reasoned that "[t]o determine whether a pregnant woman is being treated the same as some other person who has the similar ability or inability to work, the pregnant woman, by logical necessity, must also be an employee." 667 F.2d at 452. See also *EEOC* v. *Joslyn Manufacturing & Supply Co.*, 524 F. Supp. at 1142 ("commonsense reading" is reference to female employees).

> the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.
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> * * * *
>
> "[T]he question of whether an employer who does cover dependents, either with or without additional costs to the employee, may exclude conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents." S. Rep. No. 331, *supra*, at 5-6.[3]

The possible application of the PDA to persons other than female employees was also raised during floor debate in the Senate. Senator Hatch asked whether the language of the Act was not overbroad, because "it is arguable that spouses of male employees are covered by this civil rights amendment." Senator Williams, a sponsor of the Act, replied:

> "I do not see how one can read into this any pregnancy other than that pregnancy that relates to the employee, and if there is any ambiguity, let it be clear here and now that this is very precise. It deals with a woman, a

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[3] The Court below acknowledged that the Senate Report states that questions about dependents' pregnancy benefits are not answered by the PDA and should be resolved according to "existing Title VII principles." The court then held that because Title VII includes the PDA, Title VII prohibits more extensive coverage of spouses' illnesses than pregnancies. 667 F.2d at 451. This reasoning is circular. If the PDA itself leaves open the question of Title VII's requirements with respect to spouses' pregnancy benefits, the mere fact that Title VII includes the PDA cannot answer that question. The Title VII principles to which the Senate Report refers must be Title VII principles *other* than the PDA.

> woman who is an employee, an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; and that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth is excluded. It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee."

Senator Hatch asked again:

> "So the Senator is satisfied that . . . what it means is that this act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment?"

Senator Williams answered, "Exactly." 123 Cong. Rec. 29,644 (1978).[4]

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[4] That the specific topic of this colloquy was income maintenance rather than medical expense programs does not weaken Senator Williams' affirmation that the Act is "narrowly drawn" for the protection of women workers. The Act does not distinguish in any way between income maintenance and other fringe benefit programs. See *EEOC* v. *Emerson Electric Co.*, 539 F. Supp. at 157 n. 3.

Similarly, the statements of Senators Cranston and Bayh on which respondent relies do not weaken Senator Williams' explanation of the Act. Although both Senators said during Senate debate that they thought equal coverage of pregnancy-related and other medical expenses of employees' dependents would be required, each made clear that he was expressing only his personal opinion. See 123 Cong. Rec. 29,641 (1978) (Statement of Senator Bayh); 123 Cong. Rec. 29,661 (1978) (Statement of Senator Cranston). The individual views of legislators are of dubious authority in the interpretation of a statute under any circumstances. Here, they are further undermined by the contrary statements of a sponsor of the PDA and in the Senate Committee Report. *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (statement of sponsor should be accorded substantial weight); *Chandler* v. *Roudebush*, 425 U.S. 840, 858 n. 36 (1976) (committee statement "more probative of Congressional intent" than remark of individual Senator in floor debate); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942) (opinions of individual Senators that conflict with statements in committee reports not persuasive).

The legislative history of the Act is replete with evidence that Congress' one, critical object was to protect working women from discrimination on the basis of pregnancy. The House Committee Report emphasizes that the assumption that women will become pregnant and leave the workforce is "at the root of the discriminatory practices which keep women in low-paying and dead-end jobs." H.R. Rep. No. 948, *supra*, at 3; see also *id.* at 6-7 ("Women are still subject to the stereotype that all women are marginal workers.") Similarly, the Senate Report explains that such assumptions are "at the core of the sex stereotype resulting in unfavorable disparate treatment of women in the workplace." S. Rep. No. 331, *supra*, at 3. Policies based on such assumptions, the Senate Committee found, "have long-term effects upon the careers of women and account in large part for the fact that women remain today primarily in low-paying, dead-end jobs." *Id.* at 6. Senator Williams told his colleagues that if the law was not changed, "countless women and their families will be forced to suffer unjust and severe economic, social, and psychological consequences." 123 Cong. Rec. 7,539 (1978). Congress was particularly concerned to redress two disadvantages suffered by pregnant employees: loss of pay during their period of pregnancy-related disability and loss of opportunity throughout their childbearing years.[5] Neither has any relevance to wives of male employees.

In short, the language and legislative history of the PDA show that the Act does not affect the rights of male employees with respect to spouses' benefits. If Congress had intended the PDA to mean that any distinction based on the pregnancy of an employee's wife is on its face discrimi-

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[5] In addition to the House and Senate Committee Reports cited in the text, see 123 Cong. Rec. 29,385 (1978) (Statement of Senator Williams); 123 Cong. Rec. 29,387 (1978) (Statement of Senator Javits); 123 Cong. Rec. 29,388 (1978) (Statement of Senator Kennedy); 123 Cong. Rec. 29,664 (1978) (Statement of Senator Brooke); 123 Cong. Rec. 10,581 (1978) (Statement of Congressman Hawkins).

natory against her husband, then the assertion in the Senate Report that that issue remains open would make no sense at all. Even as amended by the PDA, Title VII provides the same protections in the context of spouses' benefits that it did when this Court decided *Gilbert* and *Satty*. The principles set forth in those cases are the "existing" Title VII principles to which the Senate Report refers. They control the disposition of this case.

II. APPLICATION OF THE TITLE VII PRINCIPLES SET FORTH IN *GILBERT* AND *SATTY* REQUIRES REINSTATEMENT OF THE JUDGMENTS OF THE DISTRICT COURT

This Court's decisions in *Gilbert* and *Satty* establish the following principles:

1. A distinction based on pregnancy is "on its face, . . . neutral in its treatment of male and female employees," *Nashville Gas Co.* v. *Satty*, 434 U.S. at 140; see also *id.* at 143 (referring to "petitioner's facially neutral seniority system"), and not a distinction based on sex. The PDA now compels a contrary conclusion if the distinction is based on the pregnancy of female employees. The PDA does not, however, disturb the principle that pregnancy-based classifications of other persons are facially neutral. *Cf. Geduldig* v. *Aiello*, 417 U.S. 484, 496 n. 20 (1974) (pregnancy-based distinctions facially neutral as matter of constitutional law).

2. Under the doctrine announced by this Court in *Griggs* v. *Duke Power Co*, 401 U.S. 424, 431 (1971), a complaining employee may establish a violation of section 703(a)(2) and, possibly, of section 703(a)(1)[6] by showing that the

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[6] This Court has queried, but not decided, whether proof of disparate impact ever is sufficient to establish that a fringe benefit package violates § 703(a)(1). See *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 710 n. 20 (1978); *Nashville Gas Co.* v. *Satty*, 434 U.S. at 144-45; *id.* at 157 n. 9 (Stevens, J., concurring).

facially neutral policy has a significantly more severe impact on employees of one sex than on employees of the other sex. Under *Gilbert*, the proper test of the impact of a compensation arrangement is whether the pregnancy-based distinction results in the arrangement being worth more to employees of one sex. Neither in *Gilbert* nor in *Satty* were the plaintiffs able to show such unequal value with respect to their employers' sick pay plans, because male and female employees were afforded the same "aggregate risk protection."[7] See *Nashville Gas Co.* v. *Satty*, 434 U.S. at 144; *General Electric Co.* v. *Gilbert*, 429 U.S. at 138. By contrast, the seniority system before the Court in *Satty* was found to have a disparate impact on women because it deprived women who were forced to take pregnancy leaves of their accrued seniority, while no comparable deprivation was suffered by men who returned to work after disability leaves.

3. A complaining employee also may establish that the employer's policy violates Title VII if it is proven to be a "mere pretext[] designed to effect an invidious discrimination" on the basis of sex, *General Electric Co.* v. *Gilbert*, 429 U.S. at 134-35.

4. If the complaining employee does not attempt to establish that the challenged policy has a disparate impact, or to show that it is a pretext for sex-based discrimination, the action must be dismissed. See *Nashville Gas Co.* v. *Satty*, 434 U.S. at 145-46 & n. 6.[8]

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[7] In *Gilbert* this Court noted that, on the basis of experience under the challenged income maintenance plan, the dollar value of the plan actually was greater for female than for male employees, 429 U.S. at 130 n. 9, but did not rely on this evidence as proof of value.

[8] In *Satty*, the case was remanded for a determination whether the plaintiff had preserved her right to proceed on a pretext theory, because neither of the courts below had made findings on that issue. Justice Powell, joined by Justices Brennan and Marshall, thought that the plaintiff also should be afforded an opportunity on remand to show disparate impact, but *only* because *Satty* was tried and

Because these principles remain valid except to the extent that they have been overturned by the PDA, and because the PDA is inapplicable to the facts of this case, this Court should reverse the decision below and reinstate the amended judgment of the District Court in Civil Action No. 80-0020-NN and the order of that Court in Civil Action No. 80-0237-NN. The only issue in both actions is whether petitioner's plan is unlawful *per se*, *i.e.*, discriminatory on its face. Respondent did not contend in the courts below that petitioner's plan has a discriminatory impact or an invidious design. Accordingly, a remand for further proceedings would be inappropriate.

III. EVEN IF PREGNANCY-RELATED DISTINCTIONS AMONG EMPLOYEES' SPOUSES WERE NOT FACIALLY NEUTRAL, THE DIFFERENTIATION INVOLVED HERE WOULD NOT VIOLATE TITLE VII BECAUSE MALE AND FEMALE EMPLOYEES RECEIVE EQUAL BENEFITS

This Court may decide that, in response to the PDA, it should reexamine the application to employees' spouses of the conclusion in *Gilbert* and *Satty* that pregnancy-based distinctions are facially neutral as a matter of law. A conclusion that the distinction made by petitioner's plan is not facially neutral, however, would not establish that the plan violates Title VII. Unlike a distinction based on a spouse's sex as such, pregnancy-related distinctions among spouses do not necessarily result in unequal treatment of male and female employees, as is proven by this case itself.

Gilbert establishes that male and female employees are treated equally with respect to fringe benefits if the benefits are not worth more to employees of one sex. The proper test of worth, this Court said, is the "aggregate risk pro-

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reviewed in the court of appeals before this Court's decision in *Gilbert*. 434 U.S. at 147 (Powell, J., concurring). But see *id.* at 157 n. 9 (Stevens, J., concurring) (agreeing with majority that remand on disparate impact issue inappropriate).

tection" afforded male and female employees. 429 U.S. at 138. Even if the Court of Appeals below were correct in concluding that because of the PDA Title VII now generally equates pregnancy with sex, the PDA would not disturb this second, distinct part of *Gilbert* setting forth a general standard not tied to the facts in that case.

Under petitioner's plan, female employees do not receive benefits for their spouses' medical expenses that are "worth more" than those that male employees receive. Each employee, whether male or female, receives the same level of coverage of all risks to which both husbands and wives are subject. Each male employee also receives somewhat less extensive coverage of his wife's pregnancy-related expenses. This coverage of some pregnancy-related expenses is an additional benefit available only to male employees. In no sense, then, is petitioner's plan more valuable to female than to male employees. Indeed, because of the benefit for spouses' pregnancies, it is more valuable to male employees.

Respondent may advance two reasons why petitioner's plan might be thought to compensate male and female employees unequally. Both are unsound when carefully examined. One argument is that the family coverage—the total coverage for an employee and his or her spouse—provided to female employees is more generous than that given to male employees. That is, a female employee receives more extensive coverage of the family's pregnancy-related expenses when she is pregnant than does the male employee when his wife is pregnant. Therefore, the argument must run, the male employee is disfavored.

This argument is meritless for two reasons. First, the inequality it purports to show is not in the benefits for employees' spouses but in the benefits for employees themselves. Had petitioner adopted, initially, a plan that covered one hundred percent of all of the medical expenses of employees only, including as required by the PDA the same one

hundred percent coverage for expenses related to pregnancy, that plan would unquestionably be in compliance with section 703. The addition of dependents' coverage that provides greater benefits for the wives of male employees than for the husbands of female employees, by covering every expense of a wife that is covered for a husband and covering a substantial part of a wife's pregnancy-related expenses, would not make the combined plan discriminatory in favor of female employees. In short, the asserted higher compensation to female employees, if it exists here, results from the mandate and application of the PDA and not from any discriminatory action of the petitioner. Thus, this argument is merely an attempt to establish indirectly that the PDA itself applies to spouses' benefits, a proposition that the text and legislative history of the Act refute.

Second, as even respondent concedes, neither Title VII nor the PDA requires that spouses' and employees' pregnancy benefits be equal. See Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604 app. at no. 22 (1982). It follows that any "inequality" in family coverage that rests entirely on a permissible difference between spouses' and employees' pregnancy benefits cannot violate Title VII.

The other argument that respondent may put forward focuses exclusively on spouses' benefits: female employees receive "full" coverage of all of their husbands' anticipated medical expenses, while male employees receive less than "full" coverage of one of their wives' anticipated medical expenses, *i.e.*, pregnancy-related expenses. This argument might be sound if there were some risk to all spouses that was not covered for male employees, but there is no such risk. Instead, every element of the "full" coverage given to female employees is given to male employees as well. Indeed, as noted above, male employees as a practical matter receive greater spouses' coverage.

In this respect, petitioner's plan is no different than a plan that provides no spouses' benefits other than limited benefits for wives' pregnancies. Such a plan does not disfavor male employees. They alone can use the only benefits provided. Instead of providing no spouses' benefits, petitioner's plan provides equal non-pregnancy benefits for all spouses. Adding equal non-pregnancy benefits for the spouses of male and female employees cannot logically convert a plan that favors male employees into one that discriminates against them.

Put differently, respondent cannot show discrimination because individual male and female employees are not similarly situated with respect to the risk of spouses' pregnancies. There simply is no risk to female employees' husbands which is comparable to the risk of pregnancy to male employees' wives.[9] Title VII does not require that differently situated employees be treated the same.

In sum, petitioner's plan does not result in unequal compensation to male and female employees. Consequently, the plan would not violate Title VII even if this Court decides that pregnancy-based distinctions among spouses are not facially neutral.

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[9] The risk of sex-specific urogenital diseases and dysfunctions is not comparable, since risks of this general type are associated with each sex, and petitioner's plan covers them equally for spouses of both sexes.

CONCLUSION

For the reasons set forth, this Court should reverse the decision of the Court of Appeals and reinstate the judgments of the District Court.

Respectfully submitted,

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